No. 77-34

In the Supreme Court of the United States

OCTOBER TERM, 1977

EDWARD GRADY PARTIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 552 F. 2d 621.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1977. On June 21, 1977, Mr. Justice Powell granted an extension of time within which to file a petition for a writ of certiorari to and including July 5, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether solicitation of a witness to testify falsely before a federal grand jury and at trial constitutes an obstruction of justice prohibited by 18 U.S.C. 1503.

2. Whether the trial judge properly refused to recuse himself from the retrials of petitioners Don and Hugh Marionneaux and petitioner Sykes.

3. Whether petitioners Don and Hugh Marionneaux and petitioner Sykes were denied a fair trial because of pretrial publicity.

STATEMENT

After separate jury trials in the United States District Court for the Western District of Louisiana,[1] petitioners were each convicted of at least one count of a three count indictment charging conspiracy to obstruct justice, in violation of 18 U.S.C. 371 and 1503. Petitioners Don and Hugh Marionneaux and petitioner Sykes were each sentenced to three years' imprisonment. Petitioner Partin was sentenced to four years' imprisonment on each of the three counts, the terms on the first and second counts to run consecutively. The court of appeals reversed petitioner Partin's convictions because of an improper jury instruction and affirmed the convictions of the other petitioners (Pet. App. 1a–87a).

[1] Petitioners Don and Hugh Marionneaux were originally tried together with petitioner Sykes. Their convictions were reversed on appeal on the grounds of improper denial of a severance and erroneous jury instructions. *United States* v. *Marionneaux*, 514 F. 2d 1244 (C.A. 5). Thereafter petitioner Sykes was tried separately from petitioners Don and Hugh Marionneaux.

The evidence, which is detailed in the opinion of the court of appeals (Pet. App. 3a–14a),[2] is not in dispute (Pet. 12–13). It showed that in 1969 petitioner Partin, then the business manager of Teamsters Local 5 in Baton Rouge, Louisiana, and others were indicted for violation of the Hobbs Act (18 U.S.C. 1951) and the Sherman Act (15 U.S.C. 2). In February 1970, before petitioner Partin's trial had commenced, Richard Baker and Claude Roberson testified before a grand jury in New Orleans that they had overheard Partin threaten Wade McClanahan, the government's principal witness in the upcoming trial, in order to dissuade him from testifying at the trial. The grand jury thereafter indicted petitioner Partin for obstruction of justice, and the trial on this charge was scheduled for October 10, 1972, in Houston, Texas (Pet. App. 4a–5a).[3]

In September 1972, Baker and Roberson "dropped from sight" (Pet. App. 5a). On September 27, 1972, after a trial subpoena for Baker had been issued, F.B.I. agents located Baker in West Virginia and told him that he was expected to appear at petitioner Partin's trial. Baker responded that he would not do so because he feared for the lives of himself and his

[2] Other aspects of the same conspiracy are set forth in the court of appeals' decision affirming the conviction of co-defendant Jeffrey Brasseaux. *United States* v. *Brasseaux*, 509 F. 2d 157, 158–160 (C.A. 5).

[3] After several trials and appeals, petitioner Partin's conviction on the Hobbs Act and Sherman Act charges was reversed (*United States* v. *Partin*, 493 F. 2d 750 (C.A. 5)), and the government elected to dismiss the indictment.

family. The agents communicated this information to the United States Attorney in New Orleans, who obtained and served a subpoena on Baker to appear before the federal grand jury on October 5, 1972. Baker again disappeared and failed to honor the grand jury subpoena (Pet. App. 5a–6a).

Baker's disappearance led to a continuance of petitioner Partin's obstruction trial. On October 31, 1972, the new trial date, Baker showed up at the federal courthouse and was arrested. Two days later, he testified at petitioner Partin's trial that he had never heard Partin threaten McClanahan. He also testified that he had met with a teamster lawyer and petitioner Don Marionneaux on October 3, 1972, and had given them a statement favorable to petitioner Partin. Baker denied that petitioner Marionneaux had given him $500 at that time, instead insisting that Marionneaux had loaned him $75. Petitioner Partin was subsequently found not guilty of threatening McClanahan (Pet. App. 6a–7a).

On November 9, 1972, Baker testified under subpoena before a federal grand jury in Baton Rouge that had begun an investigation into possible obstruction of justice in connection with petitioner Partin's obstruction of justice trial. In this appearance, Baker repudiated his testimony at that trial, stating that he had in fact received $500 from petitioner Don Marionneaux and that other individuals also had been involved in obstructing justice in connection with the trial (Pet. App. 7a). However, Baker again appeared before the grand jury on January 24, 1973, and repudiated his November 1972 grand jury testimony. This time he stated, as he had at petitioner Partin's trial, that petitioner Don Marionneaux had loaned him $75 rather than given him $500. Baker pleaded guilty on February 14, 1973, to making false material declarations before the grand jury (Pet. App. 7a–8a).

On October 4, 1973, the Baton Rouge grand jury returned an indictment charging petitioners Partin and Don and Hugh Marionneaux and others with conspiracy to obstruct justice by inducing and assisting Baker not to appear before the New Orleans grand jury on October 5, 1972, and to give false testimony at petitioner Partin's trial (Pet. App. 8a–9a, n. 3). A second count charged petitioners Partin and Sykes and others with conspiracy to obstruct justice by inducing Roberson not to appear at Partin's trial (*id.* at 10a–11a, n. 4). A third count charged petitioner Partin and another person with conspiracy to obstruct justice by inducing Baker falsely to repudiate his initial testimony before the Baton Rouge grand jury (*id.* at 11a, n. 5).

ARGUMENT

1. Petitioners contend (Pet. 20–30) that the charges contained in Counts I and III of the indictment that they conspired to induce Baker to commit perjury at trial and before the grand jury did not state an offense under 18 U.S.C. 371 and 1503, since the allegations at most amounted to subornation of perjury, in violation of 18 U.S.C. 1622. This claim does not warrant review by this Court.

To begin with, petitioners Don and Hugh Marionneaux and petitioner Sykes did not brief or argue this issue in the court of appeals, and that court accordingly did not address the issue as to them.[4] The rule is well settled that "[o]nly in exceptional circumstances will this Court review a question not raised in the court below." *Lawn* v. *United States,* 355 U.S. 339, 362–363, n. 16. See also *United States* v. *Lovasco,* No. 75–1844, decided June 9, 1977, slip op. 5, n. 7; *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 147, n. 2. Petitioners have presented no exceptional circumstances here.

In any event, petitioners' claim fails on the merits. The statute petitioners were charged with conspiring to violate, 18 U.S.C. 1503, prohibits, *inter alia,* the corrupt use of "threats or force * * * to influence, intimidate, or impede any witness, in any court of the United States * * *," as well as the corrupt use of threats of force to influence, obstruct, or impede "the due administration of justice." The conduct charged in Counts I and III violated each of these clauses of Section 1503.

The court of appeals properly held that the "due administration" clause "is broad enough to cover any act, committed corruptly, in an endeavor to impede or obstruct the due administration of justice" (Pet.

[4] Indeed, petitioner Sykes could not have raised the issue since he was convicted only on Count II, which alleged that he intimidated Roberson and another witness not to appear before the grand jury (see Pet. App. 10a, n. 4)

Although petitioner Partin presented this claim in the court of appeals, his conviction has been reversed and he has been granted a new trial. Petitioner may be acquitted at that trial, in which case his claim that the indictment failed to state an offense would be moot. See *Cobbledick* v. *United States*, 309 U.S. 323. Petitioner Partin's retrial has been set for September 26, 1977.

App. 27a, quoting from *Samples* v. *United States,* 121 F. 2d 263, 266 (C.A. 5), certiorari denied, 314 U.S. 662), and that "[i]t is plain that the object of the conspiracies charged was to obstruct the due administration of the Houston trial [of petitioner Partin] and the Baton Rouge grand jury proceeding" (Pet. App. 26a).[5] Intimidating a witness to give false material testimony plainly perverts the judicial system and the search for truth. By the same token, petitioners' conduct violated the first clause of the statute, which specifically prohibits corrupt endeavors to "influence any witness" in a federal judicial proceeding, a phrase that obviously includes the solicitation of false testimony by threats or force. Although petitioners argue (Pet. 29) that the allegations in the indictment do not fall within Section 1503 because they would establish a subornation of perjury under 18 U.S.C. 1622, it is settled that a single act or transaction may violate more than one criminal statute. See *United States* v. *Moore,* 423 U.S. 122, 137–138; *United States* v. *Beacon Brass Co., Inc.,* 344 U.S. 43, 45; *United States* v. *Gilliland,* 312 U.S. 86, 95–96: *United States* v. *Harris,* 558 F. 2d 366, 368 (C.A. 7).

[5] See also *Anderson* v. *United States*, 215 F. 2d 84, 87–88 (C.A. 6), certiorari denied *sub nom. Lewis* v. *United States*, 348 U.S. 888 ("There can be no reasonable doubt that an effort to alter testimony of witnesses for a corrupt purpose would plainly be an endeavor to impede the due administration of justice."); *Broadbent* v. *United States*, 149 F. 2d 580, 581–582 (C.A. 10).

Finally, petitioners' reliance upon cases such as *United States* v. *Essex*, 407 F. 2d 214 (C.A. 6), which have narrowly construed the "due administration of justice" portion of 18 U.S.C. 1503 to exclude conduct (such as perjury) that is not directed at a *participant* in a trial or before a grand jury, is unavailing. Even assuming that these cases were correctly decided (but see *United States* v. *Walasek*, 527 F. 2d 676 (C.A. 3); *United States* v. *Cohn*, 452 F. 2d 881 (C.A. 2), certiorari denied, 405 U.S. 975), they are inapposite here, since petitioners were charged with influencing a participant (*i.e.*, witness Baker) within the meaning of Section 1503.[6]

2. Petitioners claim (Pet. 30–43) that the trial judge should have recused himself from their retrials because he had previously presided over the initial trials of several of the petitioners and their co-defendants and had accepted the guilty plea of another co-defendant whom he did not sentence until after the co-defendant had testified on behalf of the government

[6] Similarly, *In re Michael*, 326 U.S. 224, and *Ex Parte Hudgings*, 249 U.S. 378, which hold that perjury by a witness, standing alone, does not constitute contempt of court, are inapposite. It is one thing to say that a witness's decision to commit perjury does not amount to an obstruction of justice, because "the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact-finding tribunal must hear both truthful and false witnesses." *In re Michael*, *supra*, 326 U.S. at 227–228. It is quite another to conclude that Section 1503 does not prohibit the conduct of third parties who prevent the free flow of truthful information, and hence obstruct participants in the judicial process, by corruptly inducing a witness to make false material statements in court.

at petitioner Partin's trial. As the court of appeals observed (Pet. App. 49a–50a), however, petitioners' recusal motion did not rely upon either 28 U.S.C. 144 or 28 U.S.C. 455, nor did it comply with the requirement of Section 144 that the party seeking disqualification file "a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party." Indeed, nowhere have petitioners made "a single allegation indicating that the district judge ever manifested, by word or deed, any hostility, animosity, or, for that matter, any emotion whatsoever towards them personally." *United States* v. *Dansker*, 537 F. 2d 40, 53 (C.A. 3), certiorari denied, 429 U.S. 1038. Absent an assertion of personal bias or other disqualifying factors, the court below properly concluded that the trial judge was not obliged to recuse himself.[7]

[7] Section 455, as amended by 88 Stat. 1609, did not alter the established standards for determining whether a judge has a disqualifying interest. See *United States* v. *Haldeman*, C.A. D.C. (*en banc*), No. 75–1381, decided October 12, 1976, slip op. 184–185, n. 297, certiorari denied *sub nom. Ehrlichman* v. *United States*, No. 76–793, decided May 23, 1977; *Parrish* v. *Board of Commissioners of Alabama State Bar*, 524 F. 2d 98, 103–104 (C.A. 5) (*en banc*). That section requires disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned." Hence, if a judge *appears* to have a disqualifying interest, the new statute mandates his recusal even if he in fact has no such interest and can preside impartially. However, there must still be "a reasonable factual basis for doubting the judge's impartiality * * *." H.R. Rep. No. 93–1453, 93d Cong., 2d Sess. 5 (1974). No such showing was made here.

Contrary to petitioners' assertions, there is no requirement that a judge step aside simply because he may be familiar with a defendant's legal or factual contentions on the basis of prior judicial proceedings. Judges frequently learn much about a case prior to trial, such as by ruling on pretrial motions or by reviewing grand jury minutes or Jencks Act materials. But "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583.

Hence, recusal is not required because the judge has previously presided over a trial in which persons alleged to have conspired with the movants were found guilty (see *United States* v. *Jeffers*, 532 F. 2d 1101, 1111–1112 (C.A. 7), affirmed in part on other grounds, No. 75–1805, June 16, 1977; *United States* v. *DiLorenzo*, 429 F. 2d 216, 220–21 (C.A.), certiorari denied, 40 U.S. 950; *Wolfson* v. *Palmieri*, 396 F. 2d 121 (C.A. 2); *Tynan* v. *United States*, 376 F. 2d 761 (C.A. D.C.), certiorari denied, 389 U.S. 845) or because he has accepted the guilty plea of a co-defendant. See *United States* v. *Bernstein*, 533 F. 2d 775, 784–785 (C.A. 2), certiorari denied, 429 U.S. 998; *United States* v. *Myers*, 381 F. 2d 814, 817 (C.A. 3), certiorari denied *sub nom. Bennett* v. *Myers*, 390 U.S. 973. Nor, as the court of appeals observed (Pet. App. 51a–54a), is it improper for a judge to preside over the retrial of defendants either because he has read

their presentence reports after the first trial or because he was reversed on earlier rulings (see *United States* v. *Harris*, 458 F. 2d 670, 678 (C.A. 5), certiorari denied *sub nom. Scott* v. *United States*, 409 U.S. 888; *United States* v. *Hernandez-Vela*, 533 F. 2d 211, 213–214 (C.A. 5); see also Pet. App. 54a and cases cited therein).[8] Although the trial judge had the discretion to disqualify himself on the basis of the arguments presented by petitioners, his refusal to do so was not erroneous.

3. Petitioners urge (Pet. 43–53) that they were deprived of a fair trial because of prejudicial pretrial publicity. Prior to their retrial, petitioners Don and Hugh Marionneaux moved for a change of venue from Shreveport, Louisiana, where their first trials had occurred, to Lake Charles, Opelousas or New Orleans, Louisiana, alleging that the publicity in the Shreveport area from the previous trials had created an atmosphere that would make a fair trial impossible. The district court's "scrupulous voir dire" (Pet. App. 6a) of the 50 members of the venire established, however, that only 11 potential jurors recalled receiving any information about the past or present trials (2 R. Supp. 32–33, 57, 63, 71). Of this group, only one

[8] Petitioners' reliance upon *United States* v. *Bryan*, 393 F. 2d 90 (C.A. 2), is misplaced for the reasons set forth in the opinion of the court of appeals (Pet. App. 50a, 54a–60a). Although the language in *Bryan* suggests that reassignment is the wiser practice in the retrial of a lengthy criminal case, this suggestion (which was imposed under the court's supervisory powers rather than as a construction of the recusal statute) has been limited and qualified by later Second Circuit decisions (see *id.* at 56a–59a).

juror had more than the slightest familiarity with the cases, and he was removed by the court for cause (2 R. Supp. 82). Each of the remaining members of the panel responded affirmatively when asked by the court if he could decide the case fairly and impartially (Pet. App. 63a). Similarly, of the prospective jurors interviewed in petitioner Sykes' trial, only seven indicated any familiarity with the case and, as petitioner concedes, "those few who admitted having heard about the former trials * * * stated they could put aside any preformed opinions and could give defendants a fair trial" (Pet. 47). Moreover, petitioners do not allege that any venireman who was challenged for cause was permitted to sit on the jury. In sum, the juries were fully qualified under the standard of *Irvin* v. *Dowd,* 366 U.S. 717, 722–723, and *Murphy* v. *Florida,* 421 U.S. 794, 799–800. See also Pet. 47.

The court of appeals correctly observed (Pet. App. 63a) that a motion for change of venue "is addressed to the sound discretion of the district court." See *Ehrlichman* v. *Sirica,* 419 U.S. 1310, 1312 (Burger, Circuit Justice). Since the *voir dire* showed that petitioners' speculation that they could not receive a fair trial in Shreveport was insubstantial, the trial judge clearly did not abuse his discretion in denying their requests for a change of venue.[9]

[9] As this Court has stated: "[T]he burden of showing essential unfairness [must] be sustained by him who claims such injustice and seeks to have the result set aside, and [must] be sustained not as a matter of speculation but as a demonstrable reality." *United States ex rel. Darcy* v. *Handy,* 351 U.S. 454, 462, quoting from *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 281.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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